

FEDERAL CIRCUIT COURT OF AUSTRALIA

FAN v MINISTER FOR IMMIGRATION & ANOR

[2015] FCCA 505

Catchwords:

MIGRATION – Skilled student visa – review of Migration Review Tribunal decision – provision of bogus documents – failure to meet Public Interest Criterion 4020.

Legislation:

Migration Act 1958, ss.97, 474

Migration Regulations 1994, reg.1.03, cl.880.225 of sch.2, cl.4020 of sch.4

Migration Amendment Regulations 2011 (No.1), reg.5

Cases cited:

Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476

Sharma v Minister for Immigration, Multicultural Affairs & Citizenship (2014) 291 FLR 289

Kaur v Minister for Immigration & Border Protection [2014] FCA 281

Applicant:

YUXUAN FAN

First Respondent:

MINISTER FOR IMMIGRATION &
BORDER PROTECTION

Second Respondent:

MIGRATION REVIEW TRIBUNAL

File Number:

SYG 2553 of 2013

Judgment of:

Judge Cameron

Hearing date:

2 February 2015

Date of Last Submission:

2 February 2015

Delivered at:

Sydney

Delivered on:

2 February 2015

REPRESENTATION

Solicitors for the Applicant: Mr C.W.F Law of The People's Solicitors

Solicitors for the Respondents: Mr L. Dennis of Sparke Helmore

ORDERS

- (1) The application be dismissed.
- (2) The applicant pay the first respondent's costs fixed in the amount of \$5,800.00.

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 2553 of 2013

YUXUAN FAN

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

MIGRATION REVIEW TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant, who is a citizen of China, applied for a Skilled – Independent Overseas Student (Class DD) subclass 880 visa on 26 June 2007. On 8 August 2012 her application was refused by a delegate of the first respondent (“Minister”) on the basis that she had not met Public Interest Criterion 4020 (“PIC 4020”) for the purposes of cl.880.225 of sch.2 to the *Migration Regulations 1994* (“Regulations”). The applicant then applied to the second respondent (“Tribunal”) for a review of that departmental decision. She was unsuccessful before the Tribunal and has applied to this Court for judicial review of the Tribunal’s decision.

2. In these judicial review proceedings the Court's task is to determine whether the Tribunal's decision is affected by jurisdictional error because that is the only basis upon which it can be set aside: s.474 *Migration Act 1958* ("Act"); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
3. For the reasons which follow, the application will be dismissed.

Relevant legislation

4. Pursuant to cl.880.225 of sch.2 to the Regulations, at the time of the decision on her visa application, the applicant had to satisfy a number of criteria including PIC 4020: *Migration Amendment Regulations 2011 (No.1)* reg.5(2). At the time of the delegate and Tribunal decisions, PIC 4020 relevantly provided:

(1) *There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority ... a bogus document or information that is false or misleading in a material particular in relation to:*

(a) *the application for the visa; or*

(b) *a visa that the applicant held in the period of 12 months before the application was made.*

...

(3) *To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.*

(4) *The Minister may waive the requirements of any or all of paragraphs (1) (a) or (b) and subclause (2) if satisfied that:*

(a) *compelling circumstances that affect the interests of Australia; or*

(b) *compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;*

justify the granting of the visa.

(5) *In this clause:*

information that is false or misleading in a material particular means information that is:

- (a) *false or misleading at the time it is given; and*
- (b) *relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.*

5. At the time of both the delegate and Tribunal decisions, reg.1.03 of the Regulations provided that “bogus document” had the same meaning as in s.97 of the Act, which provided at all relevant times:

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) *purports to have been, but was not, issued in respect of the person; or*
- (b) *is counterfeit or has been altered by a person who does not have authority to do so; or*
- (c) *was obtained because of a false or misleading statement, whether or not made knowingly.*

Background

6. As noted earlier, the applicant lodged her application for a subclass 880 visa on 26 June 2007, nominating the occupation of “Cook”. In her application, the applicant indicated that she had applied to the relevant assessing authority, Trades Recognition Australia (“TRA”), for an assessment of her skills on 20 July 2007 but had not yet obtained a suitable skills assessment. On 21 December 2007 an officer of the Minister’s department (“Department”) wrote to the applicant to inform her that her skills assessment had been declared successful by TRA.
7. On 26 April 2012 a departmental officer wrote to the applicant inviting her to comment on suspected fraudulent information provided by her to TRA in relation to an earlier skills assessment process based on her employment at the Amazing Grace Spanish Restaurant (“the restaurant”). As summarised by the Tribunal, the applicant had

submitted a number of documents to TRA in respect of that assessment including:

- a) a letter from a Ms Grace Huang, stating that the applicant had worked at the restaurant between January 2005 and November 2006;
 - b) a statutory declaration from the applicant referring to her employment at the restaurant between January 2006 and November 2006;
 - c) a letter from a Mr Bing Zhang, on the Australian Institute of Commerce and Language (“AICL”) letterhead, confirming that the applicant was given work placement at the restaurant as part of an agreement between AICL and the restaurant; and
 - d) a number of pay slips relating to that employment.
8. The applicant’s departmental file indicated that in 2007 and 2008 the Department undertook an investigation concerning potentially fraudulent documentation and executed a search warrant on the restaurant on 10 December 2008. As summarised by the Tribunal, the departmental file contained the following information about that investigation:
- a) the Department had identified a number of applicants who had claimed work experience at the restaurant, all of whom appeared to have been linked to a former migration agent who was alleged to have provided false statements and documents to the Department. The applicants had provided almost identical documents and working statements containing information obtained from various websites;
 - b) a licence agreement between the Spanish Club and the restaurant dated 12 April 2006, which allowed the restaurant to use the club’s premises;
 - c) a copy of the restaurant’s public risk insurance policy dated 31 March 2006; and

- d) the fact that Ms Huang, who signed the applicant's employment reference on 1 July 2007, had not been in Australia at the time the letter was written and the signature did not appear to be hers when compared with other documents available to the department.
9. Comment was also sought by the Department from AICL which stated that the letter purportedly from Mr Zhang had not been issued by it and was fraudulent as AICL had had no arrangements with the restaurant to provide work placements and the author was not an employee of AICL at the time the letter was issued on 8 August 2007.

The Tribunal's decision and reasons

10. The Tribunal found that the applicant had not worked at Amazing Grace Spanish Restaurant between January 2006 and December 2006 and that she had claimed such employment in her applications to TRA. As a result, the Tribunal found that the applicant's employment reference and statutory declaration and Mr Zhang's letter, which were all provided to TRA, were bogus documents. In this connection, the Tribunal:
- a) was not satisfied that the restaurant operated before April 2006 given that the licence agreement between the restaurant and the Spanish club had been signed in April 2006 and the public risk insurance was obtained on 31 March 2006;
 - b) referred to the applicant's evidence to the delegate and the Tribunal that she had not worked at the restaurant; and
 - c) found that the letter prepared by Mr Zhang was not issued by AICL, contained false information and was prepared by someone who had had no authority to do so and was not an employee of AICL at the time of issuance.
11. The Tribunal did not accept the applicant's claim that she had been an innocent victim of fraud perpetrated by Mr Zhang and found that she would and should have been aware of the information and documentation that was being submitted on her behalf to TRA. In reaching that conclusion, the Tribunal:

- a) referred to the applicant's claim that she had signed blank documents because she trusted Mr Zhang as he was her teacher, as was the custom in Chinese culture, and had had no knowledge of or control over the application process. In this regard, it considered that she was ultimately responsible for ensuring that all the information provided was correct and accurate and that she should have questioned Mr Zhang if she had had any concerns about his actions;
 - b) considered that the applicant would have been aware that she was required to complete 900 hours of work experience before making her application to TRA. In this connection the Tribunal referred to the applicant's evidence at the delegate's interview that "everyone was looking for 900 hours" and her evidence at the Tribunal hearing that she had not completed the required hours. It therefore found that the applicant would have known that if the TRA application requiring 900 hours of work experience was being submitted on her behalf and she did not have the 900 hours of work experience required, such application would contain false or misleading information;
 - c) referred to the applicant's evidence at the delegate's interview that it was her handwriting on the first TRA application and that she filled in the application and submitted the relevant documents with it; and
 - d) considered that the applicant was cognisant of, but unconcerned by, the provision of false information or bogus documents as she continued to claim at her interview with the delegate that she had commenced work at the restaurant in January 2006.
12. The Tribunal did not accept the applicant's claim in her written submission to it that she had attempted to obtain a skills assessment for the sole purpose of assessing her training and not her visa. The Tribunal stated that the applicant had intended to make the application for the visa and had instructed another person to do whatever was necessary to obtain it. She was aware that 900 hours of employment were required in order to obtain the skills assessment. The Tribunal did not accept that three skills assessment applications to TRA were made for any purpose other than to assist in the applicant's visa application.

13. The Tribunal also referred to the applicant's submission that she had not provided a bogus document as she had submitted to the Department a skills assessment that related to other employment. While the Tribunal accepted that the applicant had not provided a bogus document to the Department and had not been issued with a skills assessment on the basis of her claimed employment at the Amazing Grace Spanish Restaurant, the Tribunal found that the applicant gave bogus documents to the relevant assessing authority, being TRA, and that whether or not a positive skills assessment was obtained was irrelevant to the operation of PIC 4020. It found the mere submission of a bogus document was sufficient to attract the operation of the criterion.
14. Further, having considered the applicant's circumstances, the Tribunal was not satisfied that there were compelling or compassionate circumstances sufficient to justify a decision to waive the requirements of PIC 4020.

Proceedings in this Court

15. In her amended application the applicant sought the following orders:
 1. *A declaration the work reference of the Golden Palace Chinese Restaurant (Golden Palace Application) submitted by the Applicant through her Registered Migration Agent (RMA) to the Trades Recognition Australia (TRA) for pre-migration skills assessment (PMSA) is the relevant information that should have been considered by the First and the Second Respondents in relation to the Applicant's Class DD (subclass 880) visa application submitted through her RMA to the First Respondent.*
 2. *A declaration that the work reference of the Amazing Grace Spanish Restaurant (Amazing Grace Application) submitted to the TRA for PMSA and all the related investigation and information obtained by the First and the Second Respondents are irrelevant information that should not have been considered by the First and the Second Respondents in relation to the Applicant's Class DD (subclass 880) visa application submitted through her RMA to the First Respondent.*
 3. *A declaration that the Applicant met the criteria of her visa application, in particular, clause 880.224 at the relevant*

time when TRA was not the relevant assessing authority and the Applicant should have been granted the visa by the First Respondent at the relevant time before the amendment of the PIC 4020 in 2011.

4. *If no declaration of (3) above, a declaration that the Applicant meets PIC 4020 of clause 880.225.*
5. *If no declaration of (1) to (4) above, a declaration that the requirements of PIC 4020 of clause 880.225 be waived for the Applicant.*
6. *An order that the matter be remitted to the Tribunal to be dealt with according to law (i.e. an Order in the nature of mandamus).*
7. *Such declaration or order as the Court deems fit.*
8. *Costs.*

16. In her amended application the applicant alleged:

1. *In relation to Order 1 above, not identifying the correct issues and, not considering the relevant matters, namely, the Golden Palace Application is the relevant information that should have been considered by the First and the Second Respondents according to ss45 to 47 and ss54 to 55 of the Migration Act 1958 (MA) and 2.07 of the Migration Regulations 1994 (MR) and Schedule 1 & 2.*

Particulars

- 1.1 *The First Respondent relied on “DIAC NSW Fraud Control and Investigations minute” which falsely claimed the Applicant “was granted a positive [pre-migration] skills assessment by TRA on 05/09/2007 [in respect of the Amazing Grace Application]” (The truth is no Amazing Grace Application was ever successfully granted by the TRA to the Applicant).*
- 1.2 *The First Respondent then relied on the same report which states, “Ms FAN claimed work experience at another establishment which was also submitted to TRA. These claims [Golden Palace Application] have not been explored by NSW Investigations”, and had not considered the Golden Palace Application.*

- 1.3 *The Second Respondent failed to identify the issues above-mentioned and had not considered Golden Palace Application as the relevant information.*
2. *In relation to Order 2 above, not identifying the correct issues and, considering irrelevant matters, namely, the Amazing Grace Application and all the related investigation and information obtained are irrelevant information that should not have been considered by the First and the Second Respondents according to ss45 to 47 and ss54 to 55 of the MA, and 2.07 of the Migration Regulations 1994 (MR), and Schedule 1 & 2.*

Particulars

- 2.1 *The First Respondent relied on “DIAC NSW Fraud Control and Investigations minute” which falsely claimed the Applicant “was granted a positive [pre-migration] skills assessment by TRA on 05/09/2007 [in respect of the Amazing Grace Application]” (The truth is no Amazing Grace Application was ever successfully granted by the TRA to the Applicant). The First Respondent had not considered unsuccessful PMSA as relevant matter in similar visa application of another applicant (refer Ground 3 below).*
- 2.2 *Batra v Minister for Immigration and Citizenship [2013] FCA 274 is the case authority that Amazing Grace Application did not have a positive PMSA granted by TRA and therefore should not have been considered by the First and the Second Respondents as the relevant information in relation to the Applicant’s visa application.*
- 2.3 *The Second Respondent (in paragraph 28 of the Tribunal Decision record) wrongly interpreted the proposition of the case, Mudiyansele v MIAC [2013] FCA 266 and applied to the Applicant’s Amazing Grace Application. The proposition of the case is not “The mere submission of a bogus document as defined in s 97 of the Act is sufficient to attract the operation of PIC4020(1)”. The full text of the sentence is “The mere submission of a bogus document as defined in s 97 of the Act is sufficient to attract the operation of PIC4020(1) regardless of the contents of such a document”. The case is about the materiality of a bogus document. It does not support the claim of the*

Tribunal that, “the applicant has given bogus documents to the relevant assessing authority, whether or not it resulted in a positive skills assessment”.

3. *In relation to Order 3 above, not considering the relevant matters and not identifying the correct issues.*

Particulars

- 3.1 *The First Respondent wrongly claimed the Applicant had obtained a positive PMSA from TRA in relation to the Amazing Grace Application. The First Respondent should have granted the visa to the Applicant on the basis of the Golden Palace Application under s65 of the Migration Act 1958 at the relevant time when the Applicant had already satisfied all the visa criteria, and in particular clause 880.224.*
- 3.2 *The First Respondent had not refused visa grant to the Applicant on the basis of their false claim of the Amazing Grace Application in 2008 or 2009 after having carried out their investigation. There was no refusal of visa grant to the Applicant in 2009, 2010, and 2011. There was no new allegation since the interview in 2009 but the First Respondent refused the visa grant to the Applicant in 2012 only after PIC 4020 was introduced in 2011.*
- 3.3 *The First Respondent had in fact granted the same class and subclass of visa to another visa applicant with substantially the same work reference in the Amazing Grace Application and the Golden Palace Application as the Applicant.*
- 3.4 *Should the First Respondent have refused the visa grant to the Applicant in 2008 or 2009 or before the amendment of PIC 4020, the Applicant would have been able to apply for a decision review and clarify the false claim about the Amazing Grace Application. The Applicant was denied the opportunity of procedural fairness.*
- 3.5 *The Second Respondent had failed to identify the correct issue, which is “the Applicant’s grant or refusal of visa was unreasonably delayed by the First Applicant under s65 of the Migration Act 1958 at the relevant time”.*

- 3.6 *The Second Respondent had incorrectly identified the issues as (i) whether the Applicant met PIC 4020 and (ii) if not, whether PIC 4020 should be waived for the Applicant.*
4. *In relation to Order 4 above, the Applicant relies on the Particulars 2.1-3 of Ground 2 and the reasons in Ground 2 above.*
5. *Not considering the relevant matters, namely, in refusing to waive the PIC 4020 conditions for the Applicant, the Second Respondent failed to consider the situations of the Applicant and other person(s) during the long waiting period for the visa application decision and the likely future impact on the Applicant and other persons which may affect the interests of Australia.*

Consideration

17. At the outset, it should be observed that many of the allegations raised in the amended application concerned what the applicant identified or asserted to be deficiencies in the conduct of her file when it was in the primary assessment stage before the Department. This Court does not have jurisdiction to consider migration decisions of a primary nature and, relevantly, is restricted to determining whether or not the Tribunal's decision is affected by jurisdictional error. For those reasons, I will not consider in any particular detail the allegations which the applicant has made concerning the delays in her claim before the Department or any inaccuracies which might have existed in the fraud report produced by the Department.
18. The burden of the first two issues raised by the amended application was that the Tribunal wrongly failed to consider a skills test which the applicant had passed based on documents which were not bogus and on information which was not false or misleading but, instead, grounded its decision on a skills test based on bogus documents supplied to TRA which was not, at that time, a relevant assessing authority. It is not necessary to consider the former issue because the matter will be determined by the latter one. This is because it does not matter how many valid assessments an applicant may have. If he or she has, in relation to a visa application, provided bogus documents to any of the persons mentioned in PIC 4020, the decision-maker must refuse the

application unless the requirements of PIC 4020(1) and (2) are waived under PIC 4020(4), which did not happen here.

19. The fatal difficulty for the applicant's case is that information was given by her and on her behalf to TRA in relation to her pursuit of a skills-related visa in the form of documents which were bogus, as that term is defined by the Act and Regulations and as the other evidence makes clear, particularly the applicant's longer affidavit filed on 21 October 2013.
20. Further, although I expressed a different view in *Sharma v Minister for Immigration, Multicultural Affairs & Citizenship* (2014) 291 FLR 289 at 296-297 [28]-[31], I respectfully accept that the correct and binding view of the law on this issue was set out in the reasons for judgment of Wigney J in *Kaur v Minister for Immigration & Border Protection* [2014] FCA 281 which is, relevantly, that it is of no significance that the TRA was not a relevant assessing authority at the time the information was given as long as it was a relevant assessing authority at the time the decision on the visa application was made. Consequently, the Tribunal was right to consider the restaurant's work reference and the applicant's statutory declaration and to conclude that she did not satisfy PIC 4020. As the applicant did not satisfy that criterion, there was no need for the Tribunal to consider the other reference or the skills assessment based on it.
21. The third issue raised by the applicant was her assertion that the Minister or his Department should have made a decision earlier than they did and that the Tribunal failed to consider this issue. This allegation misunderstood the Tribunal's role, which was to reconsider the application and decide whether the applicant was entitled to be granted a visa. Any delay in the departmental decision-making process could not have justified ignoring the application to her of PIC 4020, which was the decisive issue as far as the applicant's application was concerned.
22. The final issue raised by the applicant was that the Tribunal should have waived PIC 4020. The issue of waiver of the criterion's requirements was expressly considered by the Tribunal in paras.33 to 38 of its reasons. The applicant submitted at the hearing of this application that the Tribunal should also have considered her

relationship status at the time of its hearing and decision but it was not suggested that that issue involved an Australian citizen, Australian permanent resident or New Zealand citizen, which would have been necessary in order that PIC 4020(4) be engaged in circumstances such as the ones referred to by the applicant.

Conclusion

23. For these reasons, jurisdictional error on the part of the Tribunal has not been demonstrated and, consequently, the application will be dismissed.

I certify that the preceding twenty-three (23) paragraphs are a true copy of the reasons for judgment of Judge Cameron

Associate:

Date: 19 August 2015